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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA

5 UNITED STATES OF AMERICA,

No. C 08-00237 MHP

6 Plaintiff,

7 **MEMORANDUM & ORDER**

8 v.

**Re: Motion to Dismiss Indictment and to
Recuse Government Counsel**

9 DAVID NOSAL, et al.,

10 Defendants.

11 Defendant David Nosal (“Nosal”) has been indicted on mail fraud, theft of trade secrets and
12 illegal computer intrusion. Nosal has moved to dismiss the pending indictment and to recuse
13 government counsel from the case. The court has considered the parties’ arguments and
14 submissions, and for the reasons stated below, the court issues the following memorandum and
15 order.

16 **BACKGROUND**¹

17 Nosal was formerly represented, during the investigative stage of this case, by Joseph
18 Russoniello while a partner at Cooley Godward Kronish, L.L.P. In 2006, Nosal replaced the Cooley
19 firm with his current counsel, Stephen Gruel. In 2007, Mr. Russoniello was appointed United States
20 Attorney (“USA”) for the Northern District of California (“NDCA”). That appointment raised
21 conflict issues with respect to this case. From the beginning of his tenure USA Russoniello recused
22 himself from any role in this matter and assigned Assistant Brian Stretch as Acting U. S. Attorney
23 for this case.

24 Assistant U.S. Attorney Kyle Waldinger remained as lead prosecutor on the case under the
25 supervision of Acting U.S. Attorney Stretch. The recusal issue was thereafter referred to the General
26 Counsel’s Office of the Executive Office for U.S. Attorneys and Associate Deputy Attorney General
27 David Margolis approved the recusal assigning Assistant Deputy Attorney General (“ADAG”) Scott
28 S. Schools, formerly the U.S. Attorney for the NDCA, as Acting U.S. Attorney for this matter.

1 Nosal seeks to dismiss the indictment and to recuse government counsel from this case.
2 Nosal argues that because Russoniello now runs the USAO for the NDCA, the conflict is imputed to
3 that entire USAO. Specifically, Nosal argues that Waldinger was improperly excluded from the
4 scope of the conflict and must be disqualified from future participation in this matter. Nosal further
5 argues that the indictment should be dismissed because it was handed down in 2008 over the
6 signatures of Assistant U.S. Attorney Brian Stretch as Acting U.S. Attorney and Waldinger, both
7 from the USAO for the NDCA. Nosal acknowledges that the government may still prosecute Nosal
8 but it must do so wholly outside the USAO for the NDCA.

9 Co-defendant Becky Christian opposes Nosal's motion that seeks to disqualify Waldinger
10 from prosecution, arguing that Russoniello has been appropriately "walled off" from the matter, the
11 conflict issue has been resolved by Schools' standing in the stead of USA Russoniello and no actual
12 impropriety or appearance therefore remains. Christian contends that the court should weigh
13 Nosal's claim of imputed conflict against the substantial costs that recusal of Waldinger would
14 impose on the other defendants, including prejudice to cooperating defendants and delayed
15 settlements.

16 The United States opposes Nosal's motion in full, arguing that no actual or imputed conflict
17 remains and no rule of professional conduct, nor any federal or state statute or case requires the
18 disqualification of an entire USAO on these facts. Specifically, the United States asserts that
19 Russoniello has not been involved in this case in any direct or indirect manner since his arrival at the
20 USAO. The United States also asserts that Waldinger does not report to Russoniello on this matter,
21 Russoniello does not evaluate Waldinger with respect to these matters, nor is Russoniello the
22 "reviewing official" or "rating official" for Waldinger on any matter. The United States contends
23 that a disqualification of government counsel is not appropriate based merely on the appearance of
24 impropriety, which is all that exists here because Nosal's former counsel is now the U.S. Attorney in
25 this District. Finally, the United States argues that dismissal of the indictment is not an appropriate
26 remedy for an alleged violation of an ethical precept.

DISCUSSION

The court must decide the issue of whether, in a criminal action where the USAO for the NDCA has recused itself due to a conflict of interest with its United States Attorney, an Assistant U.S. Attorney in that office may remain on the case under the supervision of an ADAG. Defendant contends that the conflict should be imputed to the entire office of the NDCA, such that the NDCA should be disqualified in toto, including Waldinger, and the case should be handed to another USAO. The United States contends that disqualification of an entire USAO is a drastic and excessive remedy that implicates separation of powers issues and that is neither mandated by any authority nor warranted in this case.

The court begins its analysis by noting that there is no rule or controlling authority that compels the vicarious disqualification of a prosecutors' office based on an individual attorney's personal conflict. Whether an entire USAO should be disqualified is a question to be determined on a case by case basis by analyzing the requirements of the California Rules of Professional Conduct, the American Bar Association ("ABA") Model Rules of Professional Conduct, and state and federal cases. The court examines each in turn.

I. Rules of Professional Conduct

The California Rules of Professional Conduct, which have been adopted by the U.S. District Court for the NDCA, provide little guidance for prosecutors' offices. No cases cited by either side have applied the conflict rule 3-310 to result in vicarious disqualification of a criminal government office. The ABA Model Rules of Professional Conduct, which have not been adopted by the U.S. District Court for the NDCA but nonetheless provide guidance to the court, provide that personal conflicts are not imputed to others in a government office. Model Rule 1.11, which addresses special conflicts of interest for former and current government officers and employees, does not impute conflicts of interest to the rest of the governmental agency lawyers. See comments 2 and 9 to rule 1.11. Model Rules 1.10 and 1.11 also eliminate the "appearance of impropriety" approach for disqualification, which is the rationale underlying Nosal's pending motion. See, e.g., Waters v. Kemp, 845 F.2d 260, 265-66 (11th Cir. 1988) (explaining that cases applying the imputation standard were decided before the Model Rules replaced the Model Code and eliminated that

1 appearance of impropriety language); United States v. Aleman, 2004 WL 1834602, *2 n.9 (W.D.
2 Tex. 2004) (noting the Model Rules “pointedly eliminated the appearance of impropriety standard”).
3 Accordingly, there is no basis under any Rules of Professional Conduct for any appearance of
4 professional impropriety or of a conflict of interest to disqualify the entire prosecution office of the
5 NDCA in this case.

6 II. California Law

7 California Penal Code section 1424 provides a legal mechanism for disqualification of a
8 prosecutors’ office. It states in relevant part: “The motion [to disqualify] shall not be granted unless
9 it is shown by evidence that a conflict of interest exists as would render it unlikely that the defendant
10 would receive a fair trial.” Cal. Penal Code § 1424(a)(1). That statute was enacted in 1980 and
11 overruled prior case law which embraced an appearance of impropriety or of a conflict of interest
12 standard and required recusal of a state prosecutor if the conflict affected his ability to perform the
13 discretionary function of his office. State cases applying section 1424 have affirmatively overruled
14 this lower standard and deemed an appearance of impropriety or of an imputed conflict insufficient
15 grounds to disqualify a prosecutor’s office. See, e.g., People v. Conner, 34 Cal.3d 141, 147 (1983)
16 (holding “the conflict must be of such gravity as to render it unlikely that defendant will receive a
17 fair trial unless recusal is ordered.”); People v. Eubanks, 14 Cal.4th 580, 592-594 (1996) (holding
18 that the appearance of impropriety alone is not an independent ground for prosecutorial
19 disqualification and an actual conflict must be so grave as to make fair treatment unlikely in order to
20 disqualify the district attorney’s office). Thus, the court finds that even if California law were
21 applied there would be no basis to force the recusal of the prosecutor’s office in this case.

22 III. Federal Law

23 There is no controlling standard in the Ninth Circuit for imputation of a conflict where a
24 private defense attorney joins a prosecutors’ office. In general, Ninth Circuit authority has refused
25 to extend cases that apply the imputed disqualification rule to private law firms equally to
26 government agencies. See Matter of Grand Jury Investigation of Targets, 918 F.Supp. 1374, 1378
27 n.11 (S.D. Cal. 1996) (noting that the imputed disqualification rule assumes that the client can hire
28 another law firm, whereas in the case of government agencies, “the only choices for federal

1 prosecution are the local AUSAs, DOJ attorneys, or special prosecutors.”). Cases cited by defendant
2 addressing the disqualification of law firms are thus not relevant to the instant inquiry. Directly
3 relevant is the Seventh Circuit’s decision in United States v. Goot, 894 F.2d 231 (7th Cir. 1990), the
4 facts of which are nearly on all fours with the instant case. Goot involved a motion to recuse a
5 USAO after the defendant’s former counsel had been appointed U.S. Attorney of the District
6 conducting the investigation. The U.S. Attorney had previously recused himself and appointed an
7 Acting U.S. Attorney for all matters concerning his former client. The Seventh Circuit affirmed the
8 district court’s refusal to recuse the entire USAO, holding that the state ethics rules did not mandate
9 the disqualification of other lawyers in the agency. Id. at 233. The court ruled that the “Chinese
10 wall” the USAO had erected rebutted the presumption that confidences were shared, the U.S.
11 Attorney was sufficiently screened from the prosecution and these procedures were in keeping with
12 the USAO’s regulations and were thus sufficient for conflict purposes.

13 The Ninth Circuit has made clear the appearance of impartiality is insufficient grounds for
14 prosecutorial disqualification. In United States v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993), a
15 defendant sought the disqualification of the USAO for the District of Hawaii based on an appearance
16 of a conflict arising out of a tax fraud where the alleged victims were AUSAs of that office. Id. at
17 1451. The Ninth Circuit held that an appearance of impropriety was insufficient and the appropriate
18 standard requires a showing of actual prejudice to disqualify a USAO. Id. at 1453 (stating the lack
19 of prejudice is underscored by: no suggestion that the charges were brought because of the
20 victimization of the U.S. Attorney himself; and no suggestion that the USAO “did not exercise its
21 discretionary function in an even-handed manner or that its zeal was not born of objective and
22 impartial consideration of the merits of this case.”) The court also noted that the general trend in the
23 law has been to limit the applicability of the vicarious disqualification rules to private organizations.
24 Id.

25 In Matter of Grand Jury Investigation of Targets, 918 F.Supp. 1374 (S.D. Cal. 1996), one
26 Assistant U.S. Attorney recused himself from investigating targets of a grand jury based on his prior
27 representation of one of the targets. The court denied defendants’ motion to disqualify the entire
28 USAO for the Southern District of California on alleged imputed ethical conflict of interest grounds.

1 The court applied the standard for disqualification from prosecution to disqualification from
2 investigation, reasoning that judicial intervention in either stage requires a showing of “serious
3 abuses.” The court concluded that Ninth Circuit authority does not support disqualifying the entire
4 USAO, when no evidence of confidential information sharing occurred and appropriate screening
5 steps were taken. Id. at 1378, citing United States v. Caggiano, 660 F.2d 184, 190-91 (6th Cir.
6 1981) (holding that vicarious disqualification does not apply to U.S. Attorney's Offices), cert.
7 denied, sub nom., Winfield v. United States, 454 U.S. 1149 (1982); Formal Opinion 342, 62
8 A.B.A.J. 517 (1976) (stating the opinion of the ABA Committee on Professional Ethics that
9 prosecutors were different from private attorneys, because “[t]he channeling of advocacy toward a
10 just result as opposed to vindication of a particular claim lessens the temptation to circumvent the
11 disciplinary rules”).

12 The court also considers United States v. Bolden, 353 F.3d 870 (10th Cir. 2003), which
13 provides caution for a court considering the recusal of an entire USAO office. Bolden did not
14 involve a prior representation, but was premised on the rule that orders disqualifying an entire
15 USAO are separate from the underlying issues. The Tenth Circuit stated the disqualification of an
16 entire USAO is almost always reversible error, because of the weighty separation of powers
17 concerns it raises. Id. at 875-876. The court noted that “where it is shown that an Assistant United
18 States Attorney is subject to a conflict of interest, the proper remedy [generally] is to remove that
19 individual, not all of the attorneys in the district, from the case.” Id. at 875.

20 Based on the foregoing, the court finds no requirement in the case law to mandate the recusal
21 of Waldinger as part of the USAO for the NDCA based on an imputed conflict or an appearance of
22 impropriety. It is the highly unusual case that disqualifies an entire USAO, and the court finds no
23 basis to warrant such a disqualification or “recusal” on these facts.

24 On oral argument, defendant distinguished prior holdings, e.g., Lorenzo, based on the fact
25 that the U.S. Attorney had not been involved in the former representation, whereas Russoniello had
26 approximately a year of discussions with his former client Nosal. As part of its analysis, the court
27 considers the extent to which any appearance of or actual impropriety or conflict could have
28 presented itself at one time, if Russoniello had any contact or role in the case after the time he took

the position of U.S. Attorney and before the USAO recused itself from the case. To that end, the court has reviewed the declaration filed under seal by Assistant U.S. Attorney Brian Stretch, who served as Acting U.S. Attorney at the time in question. It is this declaration upon which the court relies, together with statements made by ADAG Schools on oral argument, to find no evidence of an actual conflict or any impropriety with regard to Russoniello's conduct. Based on the written and oral assurances from the United States, Russoniello was screened from the matter upon entering the USAO for the NDCA and had no involvement whatsoever in the matter either directly or indirectly from the first day of his tenure as U.S. Attorney. The court noted the absence of a declaration from Russoniello and indicated that such might have been useful, but none was filed. Nevertheless, in careful consideration of the parties' submissions and arguments, the court finds no requirement under any controlling rule, state or federal case law addressing the recusal of prosecutors based on imputed conflicts that the entire USAO for the NDCA, including Assistant U.S. Attorney Waldinger, be removed from this case. However, out of an abundance of caution the court directs USA Russoniello to file a declaration under seal setting forth the efforts he has taken to ensure that he has not had and does not have any communication with or influence upon AUSAs Stretch, Waldinger and others in his office working on this case; the steps he has taken to wall himself off from any and all matters related to this case; and any other procedures he has put in place to prevent conflicts between the USAO of this district and his former client.

CONCLUSION

For the foregoing reasons, defendant Nosal's motion to dismiss the indictment and to recuse government counsel is **DENIED** subject to the review of the declaration ordered above. USA Russoniello shall file his declaration within ten (10) days of the date of this order.

IT IS SO ORDERED.

Dated: February 24, 2009


MARILYN HALL PATEL
United States District Court Judge
Northern District of California

United States District Court
For the Northern District of California

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ENDNOTES

1. All facts cited herein are taken from the record and the parties' submissions.